

NO. 49111-7-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION TWO

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STATE OF WASHINGTON,

Respondent,

v.

MICHAEL JACKSON, JR.,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable Edmund Murphy, Judge  
The Honorable Ronald Culpepper, Judge

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BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The court exceeded its statutory authority in ordering restitution for damages unrelated to appellant's offense.

2. This Court should exercise its discretion not to impose appellate costs should the State substantially prevail on appeal.

Issues pertaining to assignments of error

1. Appellant was charged with second degree assault based on allegations he committed a course of conduct which included breaking the victim's ankle. The jury found him not guilty of second degree assault but guilty of the lesser included offense of fourth degree assault. Did the court exceed its authority in ordering restitution for damages incurred in treating the broken ankle, for which the jury did not convict appellant?

2. Given the serious problems with the LFO system recognized by our Supreme Court in Blazina, should this Court exercise its discretion to deny cost bills filed in the cases of indigent appellants?

B. STATEMENT OF THE CASE

1. Procedural History

On February 13, 2015, the Pierce County Prosecuting Attorney charged appellant Michael A. Jackson, Jr., with second degree assault and unlawful imprisonment of Trinity Lee. CP 1-2; RCW 9A.36.021(1)(a);

RCW 9A.40.040. The State later added a second count of second degree assault, a charge of unlawful possession of a firearm, and eight counts of violation of a protection order. CP 15-21; RCW 9.41.040(1)(a); RCW 26.50.110(1). The case proceeded to jury trial before the Honorable Edmund Murphy. The jury found Jackson not guilty on both second degree assault charges and the unlawful imprisonment charge. It entered guilty verdicts on the lesser included offense of fourth degree assault as to count I, the firearm charge, and the protection order charges. By special verdicts the jury found that Jackson and Lee were members of the same family or household. CP 109-34.

The court entered a standard range sentence of 41 months on the firearm charge and suspended sentences on the misdemeanors. CP 185, 192, 195. The court found that Jackson's indigency made imposition of non-mandatory LFOs inappropriate and imposed only mandatory fines and fees. CP 183. The Judgment and Sentence Suspended as to the misdemeanor counts set a date for the restitution hearing and indicated that Jackson would be present for that hearing. CP 195.

On August 30, 2016, a restitution hearing was held before the Honorable Ronald E. Culpepper. The court entered an order setting restitution in the amount of \$14,871.87. Supp. CP (Order Setting Restitution, filed 8/30/16).

## 2. Substantive Facts

Three of the charges in this case arose out of an argument between Michael Jackson and Trinity Lee on February 8, 2015. In Count I, the State charged Jackson with second degree assault, alleging he intentionally assaulted Lee thereby recklessly inflicting substantial bodily harm. CP 15. The jury found Jackson not guilty of this offense. CP 110. Instead, it convicted him of the lesser included offense fourth degree assault. CP 112. Count II charged Jackson with unlawful imprisonment, and the jury found Jackson not guilty of that offense. CP 15, 113. The jury also found Jackson not guilty on Count III, another charge of second degree assault, which alleged that Jackson assaulted Lee with a firearm. CP 16, 115.

There was no dispute at trial that Lee indeed sustained a broken ankle on the night in question. 8RP<sup>1</sup> 723. The question for the jury was whether the State proved that Jackson inflicted that injury. Lee testified that Jackson broke her leg by slamming a car door on it. 4RP 231-32. The doctor who examined Lee in the emergency room testified that her injuries were consistent with significant traumatic force. 8RP 724. Jackson testified, however, that Lee fell and twisted her ankle. 9RP 809.

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<sup>1</sup> The Verbatim Report of Proceedings is contained in eleven volumes, designated as follows: 1RP—6/3/15, 7/13/15 and 12/3/15; 2RP—2/18/16 (reporter Frederick); 3RP—2/18/16 and 2/22/16; 4RP—2/23/16, 3/1/16 and 3/2/16; 5RP—3/3/16 and 3/7/16; 6RP—3/8/16; 7RP—3/9/16; 8RP—3/10/16; 9RP—3/14/16; 10RP—3/15/16, 3/16/16, 4/15/16 and 4/19/16; 11RP—8/30/16.

And the radiologist who interpreted the images taken of Lee's leg testified that the type of fracture she sustained is caused by rolling the ankle, by anything that causes the ankle to turn abruptly and violently. 7RP 561.

In addition to claiming Jackson had broken her leg, Lee also testified that he pointed a gun at her and threatened to shoot her car window, hit her several times trying to get her to open the car door, and hit her in the face and leg numerous times in the parking lot and once they were inside the apartment. 4RP 231-33.

In closing argument, the State described the allegations it was relying on to establish second degree assault in Count I:

He's been charged in Count I, Assault Second Degree. In that charge, it has been alleged that he assaulted Ms. Trinity Lee by intentionally assaulting her, and then recklessly inflicting substantial bodily harm. That is for the alleged act that happened when he pushed the car door into her leg, and then for a continuous course of assault in the parking lot and then in the apartment.

10RP 913-14. The prosecutor continued, arguing that what was in dispute in Count I was whether Jackson intentionally assaulted Lee and thereby recklessly inflicted substantial bodily harm.

What does that mean for Count I? What that means in layman's terms, if we pare that down some more, did he intentionally break Ms. Lee's leg. That's what this all kind of comes down to. All we know is Mr. Jackson is denying any type of assault.

10RP 915. The prosecutor argued further that substantial bodily harm includes a fracture, such as the one Lee sustained to her ankle. 10RP 917.



The defense argued that Jackson did not break Lee's leg, but if the jury found that his conduct crossed the line, it was at most fourth degree assault. 10RP 951. The jury found Jackson not guilty of second degree assault based on inflicting substantial bodily harm. CP 110. Instead, it convicted him of the lesser included offense of fourth degree assault. CP 112.

Jackson was sentenced by the trial judge. The prosecutor asked the court to order restitution, which she estimated would be in excess of \$12,000, and she asked the court to set a restitution hearing to determine the final amount. 10RP 1010-11. In making the sentence recommendation, the prosecutor acknowledged that the jury did not find that Jackson had broken Lee's ankle. She noted that the jury did find Jackson assaulted Lee, however, and there was evidence of bruising. 10RP 1012. The court noted that restitution would be set by a later order of the court. 10RP 1025. Jackson informed the court that he wanted to be present at the restitution hearing, and the court included that notation in the Judgment and Sentence. 10RP 1027; CP 188, 195.

The restitution hearing was held before a different judge with a different deputy prosecuting attorney representing the State. The prosecutor noted that Lee's insurance company was subrogating the claim and asking for restitution of \$14,871.87. He argued that the financial

damages flowed naturally from the charge and asked the court to order the requested amount. 11RP 3-4.

The defense objected. Counsel pointed out that the State had charged Jackson with second degree assault for allegedly breaking Lee's leg with a car door, but he was acquitted of that charge. He was convicted of a lesser included offense of fourth degree assault. So while there was evidence Lee had a broken leg, the jury concluded Jackson did not inflict that injury. 11RP 4-5. It was clear from the jury's verdict that Jackson did not cause the injury for which the damages were incurred. 11RP 5-6.

The court then swore Lee in as a witness, and Lee testified that Jackson broke her ankle with a car door. 11RP 7. Lee said the bills submitted in the restitution materials all related to the injuries to her leg. 11RP 9-10. As she had at trial, Lee claimed that there was no other source of injury to her leg other than the assault by Jackson. 11RP 11.

The State argued that, regardless of the jury's verdict, it was clear from Lee's testimony at the restitution hearing that Jackson harmed Lee and restitution was being sought for easily ascertainable damages. 11RP 12. Defense counsel argued that the law requires a nexus between the defendant's conduct and the injury before restitution can be imposed. 11RP 12. The court responded that Jackson was convicted of assaulting Lee, and Lee said the injuries are a result of the assault. 11RP 12. The

court acknowledged that it did not know what the trial testimony was but stated it was clear Lee incurred quite a bit of medical costs as a result of her injuries. Since she testified that Jackson caused the injuries, and Jackson was convicted of assaulting her, the State had shown that the requested restitution was for clearly ascertainable damages related to the conviction. 11RP 13-14.

C. ARGUMENT

1. THE COURT EXCEEDED ITS STATUTORY AUTHORITY IN ORDERING RESTITUTION FOR DAMAGES UNRELATED TO JACKSON'S OFFENSE.

A sentencing court's authority to order restitution is derived entirely from statute. State v. Smith, 119 Wn.2d 385, 389, 831 P.2d 1082 (1992); State v. Cawyer, 182 Wn. App. 610, 616, 330 P.3d 219 (2014). Jackson was convicted of and sentenced for the crime of fourth degree assault, a misdemeanor, and the court suspended his sentence. CP 192-96. When the court suspends a sentence on a misdemeanor offense, it may order the defendant "to make restitution to any person or persons who may have suffered loss or damage by reason of the commission of the crime in question...." RCW 9.92.060(2); State v. Marks, 95 Wn. App. 537, 539-40, 977 P.2d 606 (1999). The court exceeded its authority in this case by ordering restitution for damages not suffered "by reason of the commission of the crime in question."

The State charged Jackson with second degree assault, alleging that he intentionally assaulted Lee, thereby recklessly inflicting substantial bodily harm. CP 15; RCW 9A.36.021(1)(a). Specifically, the State relied on Lee's testimony that Jackson committed a continuous course of assault during which he slammed a car door on her, breaking her ankle. 10RP 913-15. The jury found Jackson not guilty of second degree assault, however, and guilty of only fourth degree assault, which does not require a finding of substantial bodily harm. RCW 9A.36.041. Thus, the jury concluded that while Jackson assaulted Lee, he did not break her ankle.

Restitution is appropriate only if there is a causal connection between the defendant's offense and the injuries for which restitution is sought. Cawyer, 182 Wn. App. at 616-17. A causal connection exists if "but for" the offense, the damages would not have occurred. Id. (citing State v. Tobin, 161 Wn.2d 517, 519, 524-25, 166 P.3d 1167 (2007)). The expenses presented for restitution, and the restitution order, were related to Lee's broken ankle. 11RP 6, 10, 13-14. Those expenses were not caused by Jackson's crime of fourth degree assault, and the jury's verdicts indicate that the State failed to prove Jackson was responsible for that injury.

Judge Culpepper seemed to believe that since there was an assault and an injury, the two must be connected. As he acknowledged, however,

he was not aware of the testimony at trial, which supported the jury's conclusion that they were not connected. First, there was evidence of an alternate explanation for the broken ankle: the radiologist testified that this type of injury is caused by rolling the ankle, Jackson testified that Lee twisted her ankle and fell, and Lee stated on more than one occasion that she rolled her ankle. 5RP 328, 356; 7RP 561; 8RP 695; 9RP 809. Second, there was also evidence of other conduct unrelated to the broken ankle which would establish fourth degree assault. 5RP 232-33. As the State acknowledged at sentencing,

[T]he jury did not find Mr. Jackson guilty of Assault in the Second Degree on what – of what happened that night. They did find him guilty of Assault Fourth Degree, evidence of bruising. They did not find he broke her ankle. They did find he assaulted her. There was definitely an assault. There was bruising on her eyes, her arms, on her legs.

10RP 1012.

The court may not order a defendant to pay restitution for a crime he was not convicted of. State v. Osborne, 140 Wn. App. 38, 39, 163 P.3d 799 (2007). In Osborne, the defendant was charged with eight counts. He pled guilty to two of the charges, and the State dismissed the rest. The court nonetheless ordered restitution relating to injury to the alleged victim of one of the dismissed charges. Id. at 40. Because the defendant did not agree to pay restitution for those damages when pleading guilty, the court

had no authority to order restitution for the uncharged crime. The Court of Appeals vacated the restitution order unrelated to the crimes of conviction. Id. at 42.

In this case, Judge Culpepper in effect ordered restitution for the felony of which Jackson was acquitted, rather than misdemeanor of which he was convicted. Because the expenses relating to Lee's broken ankle were not suffered by reason of the fourth degree assault, the court lacked authority to order restitution for those expenses. The order of restitution must be vacated. See Osborne, 140 Wn. App. at 39, 42.

2. THIS COURT SHOULD EXERCISE ITS DISCRETION  
AND DECLINE TO IMPOSE APPELLATE COSTS.

The trial court entered an order of indigency finding that Jackson was entitled to seek appellate review wholly at public expense, including appointed counsel, filing fees, costs of preparation of briefs, and costs of preparation of the verbatim report of proceedings. CP 211-12. In addition, the court found that Jackson's indigency made imposition of non-mandatory LFOs inappropriate. CP 183; 10RP 1025

a. **The serious problems *Blazina* recognized apply equally to costs awarded on appeal, and this Court should exercise its discretion to deny cost bills filed in the cases of indigent appellants.**

Our supreme court in Blazina recognized the "problematic consequences" legal financial obligations (LFOs) inflict on indigent

criminal defendants. State v. Blazina, 182 Wn.2d 827, 836, 344 P.3d 680 (2015). LFOs accrue interest at a rate of 12 percent so that even persons “who pay[] \$25 per month toward their LFOs will owe the state more 10 years after conviction than they did when the LFOs were initially assessed.” Id. This, in turn, “means that courts retain jurisdiction over the impoverished offenders long after they are released from prison because the court maintains jurisdiction until they completely satisfy their LFOs.” Id. “The court’s long-term involvement in defendants’ lives inhibits reentry” and “these reentry difficulties increase the chances of recidivism.” Id. (citing AM. CIVIL LIBERTIES UNION, IN FOR A PENNY: THE RISE OF AMERICA’S NEW DEBTOR’S PRISONS, at 68-69 (2010), available at [https://www.aclu.org/files/assets/InForAPenny\\_web.pdf](https://www.aclu.org/files/assets/InForAPenny_web.pdf); KATHERINE A. BECKETT, ALEXES M. HARRIS, & HEATHER EVANS, WASH. STATE MINORITY & JUSTICE COMM’N, THE ASSESSMENT AND CONSEQUENCES OF LEGAL FINANCIAL OBLIGATIONS IN WASHINGTON STATE, at 9-11, 21-22, 43, 68 (2008), available at [http://www.courts.wa.gov/committee/pdf/2008LFO\\_report.pdf](http://www.courts.wa.gov/committee/pdf/2008LFO_report.pdf)).

To confront these serious problems, our supreme court emphasized the importance of judicial discretion: “The trial court must decide to impose LFOs and must consider the defendant’s current or future ability to pay those LFOs based on the particular facts of the defendant’s case.”

Blazina, 182 Wn.2d at 834. Only by conducting such a “case-by-case analysis” may courts “arrive at an LFO order appropriate to the individual defendant’s circumstances.” Id.

The Blazina court addressed LFOs imposed by trial courts, but the “problematic consequences” are every bit as problematic with appellate costs. The appellate cost bill imposes a debt for losing an appeal, which then “become[s] part of the trial court judgment and sentence.” RCW 10.73.160(3). Imposing thousands of dollars on an indigent appellant after an unsuccessful appeal results in the same compounded interest and retention of court jurisdiction. Appellate costs negatively impact indigent appellants’ ability to move on with their lives in precisely the same ways the Blazina court identified.

Although Blazina applied the trial court LFO statute, RCW 10.01.160, it would contradict and contravene Blazina’s reasoning not to require the same particularized inquiry before imposing costs on appeal. Under RCW 10.73.160(3), appellate costs automatically become part of the judgment and sentence. To award such costs without determining ability to pay would circumvent the individualized judicial discretion that Blazina held was essential before including monetary obligations in the judgment and sentence.



Jackson has been determined to qualify for indigent defense services on appeal. To require him to pay appellate costs without determining his financial circumstances would transform the thoughtful and independent judiciary to which the Blazina court aspired into a perfunctory rubber stamp for the executive branch.

In addition, the prior rationale in State v. Blank, 131 Wn.2d 230, 930 P.2d 1213 (1997), has lost its footing in light of Blazina. The Blank court did not require inquiry into an indigent appellant's ability to pay at the time costs are imposed because ability to pay would be considered at the time the State attempted to collect the costs. Blank, 131 Wn.2d at 244, 246, 252-53. But this time-of-enforcement rationale does not account for Blazina's recognition that the accumulation of interest begins at the time costs are imposed, causing significant and enduring hardship. Blazina, 182 Wn.2d at 836; see also RCW 10.82.090(1) ("[F]inancial obligations imposed in a judgment shall bear interest from the date of the judgment until payment, at the rate applicable to civil judgments."). Moreover, indigent persons do not qualify for court-appointed counsel at the time the State seeks to collect costs. RCW 10.73.160(4) (no provision for appointment of counsel); RCW 10.01.160(4) (same); State v. Mahone, 98 Wn. App. 342, 346-47, 989 P.2d 583 (1999) (holding that because motion for remission of LFOs is not appealable as matter of right, "Mahone

cannot receive counsel at public expense”). Expecting indigent defendants to shield themselves from the State’s collection efforts or to petition for remission without the assistance of counsel is neither fair nor realistic. The Blazina court also expressly rejected the State’s ripeness claim that “the proper time to challenge the imposition of an LFO arises when the State seeks to collect.” Blazina, 182 Wn.2d at 832, n.1. Blank’s questionable foundation has been thoroughly undermined by the Blazina court’s exposure of the stark and troubling reality of LFO enforcement in Washington.

Furthermore, the Blazina court instructed *all* courts to “look to the comment in GR 34 for guidance.” Blazina, 182 Wn.2d at 838. That comment provides, “The adoption of this rule is rooted in the constitutional premise that *every level of court* has the inherent authority to waive payment of filing fees and surcharges on a case by case basis.” GR 34 cmt. (emphasis added). The Blazina court also suggested, “if someone does meet the GR 34[(a)(3)] standard for indigency, courts should seriously question that person’s ability to pay LFOs.” Blazina, 182 Wn.2d at 839. This court receives orders of indigency “as a part of the record on review.” RAP 15.2(e). “The appellate court will give a party the benefits of an order of indigency throughout the review unless the trial court finds the party’s financial condition has improved to the extent that

the party is no longer indigent.” RAP 15.2(f). This presumption of continued indigency, coupled with the GR 34(a)(3) standard, requires this court to “seriously question” an indigent appellant’s ability to pay costs assessed in an appellate cost bill. Blazina, 182 Wn.2d at 839.

This court has ample discretion to deny cost bills. RCW 10.73.160(1) states the “court of appeals . . . *may* require an adult . . . to pay appellate costs.” (Emphasis added.) “[T]he word ‘may’ has a permissive or discretionary meaning.” Staats v. Brown, 139 Wn.2d 757, 789, 991 P.2d 615 (2000). Blank, too, acknowledged appellate courts have discretion to deny the State’s requests for costs. 131 Wn.2d at 252-53. Given the serious concerns recognized in Blazina, this court should soundly exercise its discretion by denying the State’s requests for appellate costs in appeals involving indigent appellants, barring reasonable efforts by the State to rebut the presumption of continued indigency. Jackson respectfully requests that this court deny a cost bill in this case should the State substantially prevail on appeal.

- b. **Alternatively, this court should remand for superior court fact-finding to determine Jackson’s ability to pay.**

In the event this court is inclined to impose appellate costs on Jackson should the State substantially prevail on appeal, he requests remand for a fair pre-imposition fact-finding hearing at which he can

present evidence of his inability to pay. Consideration of ability to pay before imposition would at least ameliorate the substantial burden of compounded interest. At any such hearing, this court should direct the superior court to appoint counsel for Jackson to assist him in developing a record and litigating his ability to pay.


If the State is able to overcome the presumption of continued indigence and support a finding that Jackson has the ability to pay, this court could then fairly exercise its discretion to impose all or a portion of the State's requested costs, depending on his actual and documented ability to pay.

D. CONCLUSION

The court exceeded its authority in ordering restitution for damages unrelated to Jackson's offense, and the order of restitution must be vacated. In addition, this Court should exercise its discretion not to impose costs on appeal.

DATED January 18, 2017.

Respectfully submitted,



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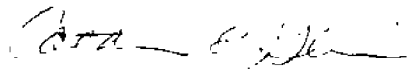


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Shelton, WA 98584

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Catherine E. Glinski  
Done in Port Orchard, WA  
January 18, 2017

**GLINSKI LAW FIRM PLLC**

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